No. 75-566



# In the Supreme Court of the United States

OCTOBER TERM, 1975

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SHIRLEY ANNE DANLEY, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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Petitioners contend that federal law cannot prohibit the distribution of material that is not obscene under state law and that the fines imposed by the district court were excessive.

Following a non-jury trial in the United States District Court for the District of Oregon, petitioner Danley was convicted of eleven counts of interstate transportation of obscene materials by common car-

rier, in violation of 18 U.S.C. 1462. Petitioner Meidel was convicted of three counts of interstate transportation of obscene materials by common carrier, in violation of 18 U.S.C. 1462, and three counts of interstate transportation of obscene materials for purposes of distribution and sale, in violation of 18 U.S.C. 1465. Petitioner Oswalt was convicted of three counts of interstate transportation of obscene materials by common carrier, in violation of 18 U.S.C. 1462, and four counts of use of the mails to ship obscene materials, in violation of 18 U.S.C. 1461. All three petitioners were convicted of conspiracy to distribute obscene materials, in violation of 18 U.S.C. 371. Petitioners Danley and Meidel were sentenced to 18 months' imprisonment and fined $15,000. Petitioner Oswalt was sentenced to concurrent terms of six months' imprisonment, to be followed by four and one-half years' probation. The court of appeals affirmed (Pet. App. A1-A4).

1. The facts were stipulated. The only contested issue was whether the publications are obscene (Pet. App. A1-A2). Petitioners contend that the publications are not obscene because at the time of the trial Oregon had no criminal laws prohibiting the distribution of sexually oriented materials to consenting adults. This establishes as a matter of law, petitioners argue, that in Oregon the contemporary community standards were not offended by any materials, however explicit. If that is so, the argument concludes, then under the standards of *Miller* v. *California*, 413 U.S. 15, any federal prosecution must fail.



The upshot of petitioners' argument is that federal laws cannot be more restrictive of obscenity than the state laws in the jurisdiction in which the trial takes place. This argument is incorrect. A federal prosecution for obscenity neither incorporates nor depends upon state laws. *United States* v. *Hill*, 500 F.2d 733 (C.A. 5), certiorari denied, 420 U.S. 952. Since obscene material is not protected under the First Amendment (*Roth* v. *United States*, 354 U.S. 476) and the federal government has a legitimate interest in preventing such material from entering the stream of interstate commerce (*Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 57-64), patently offensive materials are subject to regulation notwithstanding the absence of a state law prohibiting their distribution. *United States* v. *12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123; *United States* v. *Orito*, 413 U.S. 139; *United States* v. *Reidel*, 402 U.S. 351.

The availability of obscene material in Oregon because of the relaxation of its criminal statutes does not imply community acceptance. *United States* v. *Manarite*, 448 F.2d 583 (C.A. 2), certiorari denied, 404 U.S. 947).[1] It indicates only that the State has

[1] Indeed, the Oregon statutes in effect at the time these offenses were committed have since been amended. In November 1974 the voters of Oregon approved a statute prohibiting the distribution of obscene materials to consenting adults.

not chosen to impose criminal penalties for conduct of this sort, whether or not the conduct offends contemporary community standards. Whether certain publications affront contemporary community standards is a question for resolution by the trier of fact. As the court of appeals properly concluded (Pet. App. A2):

> The trial court objectively considered standards in the State of Oregon and in the states in which there were recipients of the materials transported and found that the average person, applying contemporary community standards, would find that those materials appealed to the prurient interest.[2]

2. Nor were the $15,000 fines imposed on petitioners Danley and Meidel excessive. These fines were well within the statutory limits.[3] That being so, appellate review of their severity is not available.[4] *Dorszynski* v. *United States*, 418 U.S. 424.

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[2] Although this Court in *Miller* v. *California*, 413 U.S. 15, rejected the view that a uniform national standard is constitutionally required, it did not hold that a specific smaller geographic area always is required. The district court here properly considered the standards of the communities into which the materials were sent as well as the standards of the forum of the trial. Cf. *Hamling* v. *United States*, 418 U.S. 87.

[3] Petitioner Danley could have been fined $65,000. Petitioner Meidel could have been fined $40,000 (Pet. App. A4).

[4] A fine of $15,000, while severe, is not cruel and unusual. The fine will be less onerous than the 18 months of imprisonment to which petitioners Danley and Meidel also have been sentenced. Petitioners have not argued that they are unable to pay the fines. Nor would petitioners be incarcerated on account of any inability to pay. See 18 U.S.C. 3569.



It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

DECEMBER 1975.

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